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Clerk

IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

NO. 49

In re Cosmopolitan Power Company, Bankrupt.

THE STATE OF NEW JERSEY, *Appellant,*

vs.

WILLIAM F. ANDERSON, Trustee of Cosmopolitan Power Company, Bankrupt, *Appellee.*

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

## REPLY BRIEF OF APPELLEE, ON MOTION TO DISMISS THE APPEAL HEREIN.

FREDERICK D. SILBER,
*Counsel for Appellee.*

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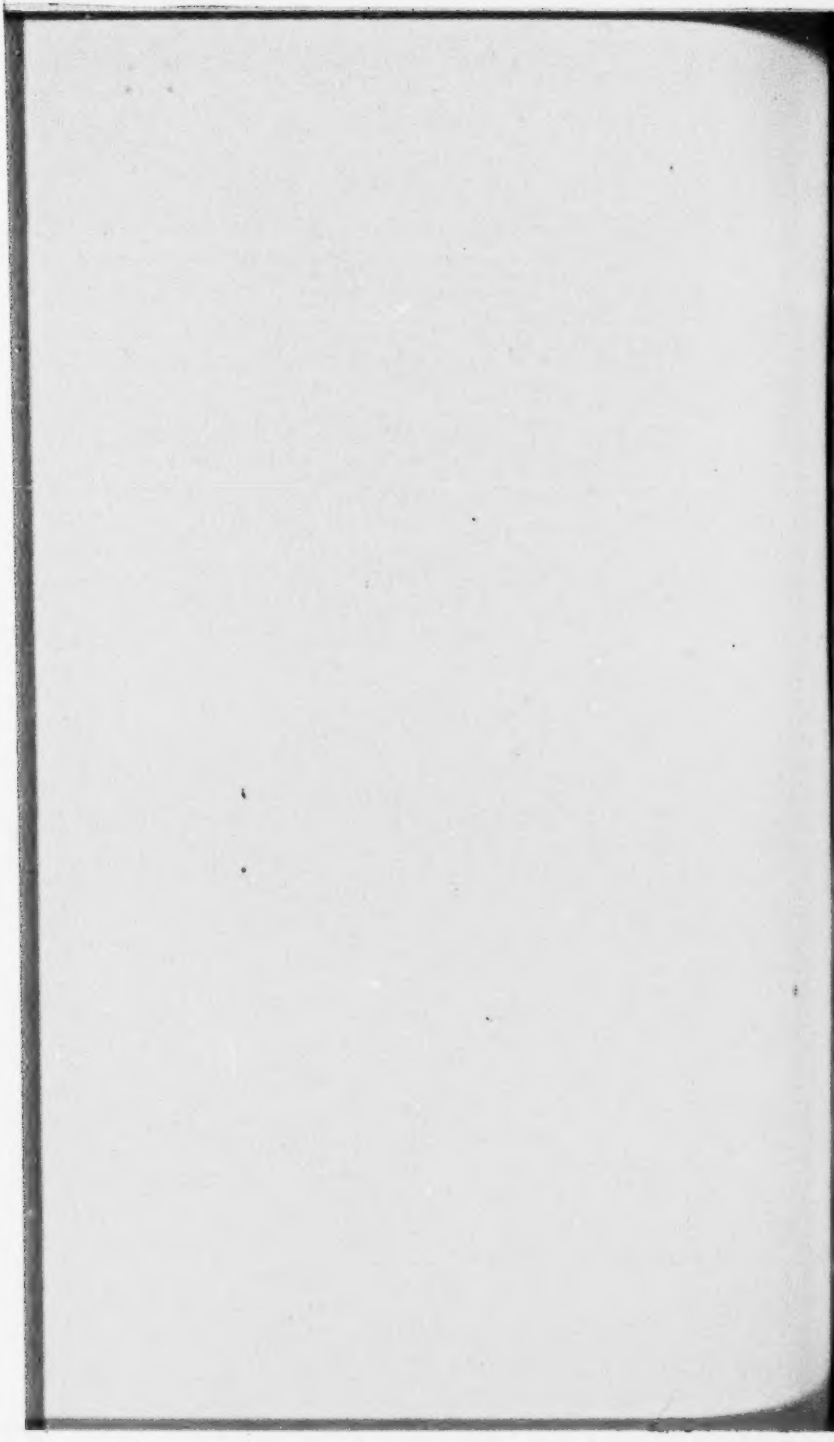

—IN THE—

# Supreme Court of the United States

OCTOBER TERM, A. D. 1905.

**NO. 302.**

In re Cosmopolitan Power Company, Bankrupt.

**THE STATE OF NEW JERSEY,** *Appellant,*

vs.

**WILLIAM F. ANDERSON, Trustee of Cosmopolitan Power Company, Bankrupt,** *Appellee.*

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

## REPLY BRIEF OF APPELLEE, ON MOTION TO DISMISS THE APPEAL HEREIN.

I.

It is urged by appellant, in the suggestions in opposition to the dismissal of the appeal, that the jurisdiction of the court over this appeal depends not upon whether it is essential that some part of the Bankruptcy Act be given a uniform construction, but upon whether some justice of this court holds it AS HIS OPINION that such a matter be involved. It would seem as if the statement of this proposition would be sufficient to condemn it.

Jurisdiction means, among other things, the power existing in the court to hear or not to hear the matter in question. Can it be possible that this power shall be determined by the individual opinion of a justice, excepting for the mere purpose of bringing the matter before the whole court? It does not seem that such an intention can reasonably be attributed to Congress. If such an intention did exist, it would be the first instance that we can find, where the whole

court is deprived of the right to pass upon its power to hear and determine the matter, for the reason that a single justice holds the opinion that the court has or has not the power. To make such a radical change in the unbroken practice and rulings of this court, would require the clearest and most explicit language that could possibly be used. There is nothing, we submit, in the language of section 25 that denotes an intention to take such a radical departure from previous practice and decisions. On the contrary, it appears that the reasonable construction of section 25 of the Bankruptcy Act is, that the granting of the certificate by a single justice, which in turn depends upon his opinion, as to whether the matter involved is essential to the uniform construction of the Bankruptcy Act, is a mere means of bringing the entire record before the court, and is meant for no other purpose whatsoever.

Under the practice an appeal may be allowed, either by the court below, or by this court. When the act says that an appeal may be had if "some justice of this court shall certify that in his opinion, etc.," it merely declares what has been the practice, in similar matters for more than a century. To hold that the expression of the opinion of one justice gives the court absolute jurisdiction over a matter, which, without that opinion, would be entirely outside of the jurisdiction of the court, seems to us to create a dangerous tendency. The same matter presented at different times, to two different justices, might, in one instance, be held to involve the necessary elements and therefore to be within the jurisdiction of this court, while, on another occasion, it might be held by another justice to be without the essential requirements and therefore to be out of the jurisdiction. To adopt counsel's view in either case would mean that the expression of the opinion of a single justice would grant or withhold jurisdiction from this court—a result that could

never have been contemplated and which, in our judgment, will never be approved of by this Honorable Court.

We leave this branch of the subject with the conviction that nothing has been urged by appellant which will satisfy the court that there is any merit in the extreme position taken by counsel.

II.

There is no question of construction of the Bankruptcy Act here involved. Counsel for appellant have attempted to show that some question of construction of section 64 of the Bankruptcy Act is involved, but we can not, after reading and carefully considering their brief, find that they have pointed out any part of the statute which demands construction.

It is clear from their argument, that they do not distinguish between differences of opinion between courts, as to whether or not a particular charge *is a tax*, and the application of the bankruptcy statute when that prior question has been answered. For instance, in each of the bankruptcy cases cited by counsel, the first inquiry has been, is the claim in question a tax, in the light of the statutes upon which it is based, or of the decisions of the highest court of the particular state which has considered it? When the answer has been that the claim is a tax, then each of the bankruptcy courts has proceeded to allow it priority. When the answer has been that the claim is not a tax, then denial of priority followed. The decisions are harmonious and uniform in this respect. In each case the court determines first, whether, under the statutes and decisions of the state in question, the claim is a tax. Manifestly, this determination does not involve any consideration of the Bankruptcy Act.

Counsel, we believe, have lost sight of the fact that the record shows that the question involved is not whether

generally, a tax is entitled to priority under section 64, but whether this particular charge, claimed under the New Jersey statutes, is entitled to priority in payment, over the claims of other creditors of the bankrupt. The referee, the District Court and the Court of Appeals, have in turn held that the claim is not a tax, AND IN THIS HOLDING THEY HAVE FOLLOWED THE DECISION OF THE HIGHEST COURT OF NEW JERSEY AS AUTHORITY. In this no construction of the Bankruptcy Act is involved. The only complaint made by appellant is that the referee, the District Court and the Court of Appeals, followed a different decision of the highest court of New Jersey than they contended should control. If the court below had followed the *Singer* case, rather than the *U. S. Car Company case*, there would be no complaint by appellant. It seems to us that this consideration should dispose of the question that any construction of the Bankruptcy Act is involved in this appeal. The decisions of the various courts below required no construction of the Bankruptcy Act, because such decisions were based entirely upon a construction of the statutes of New Jersey and of the decisions of the highest court of that state. If a claim made under the laws of another state had been involved, the statutes and decisions of that state would have been examined and the court would have decided the question accordingly. But how can it be said that such differences in statutes and decisions involve any uniform construction of the Bankruptcy Act? In a claim made by the State of Pennsylvania, the court might find that under the statutes and decisions of Pennsylvania it was a tax and allow it priority, while on a claim made by the State of New Jersey the court might find that the exaction was not a tax, and deny it priority. But the difference in these holdings would not mean a lack of uniformity, in the application or construction of the Bankruptcy Act.

Counsel have been obliged to lay stress upon the language of the opinion of the Court of Appeals that even if the Singer case were controlling the court would not necessarily be bound to follow it blindly, and from that language they seek to draw the conclusion that there is involved in this appeal the question whether the bankruptcy courts must follow the state courts or whether they have a right to examine the substance of the thing claimed, and determine its nature for themselves. The answer to counsel's contention in this behalf is, that it makes no difference what the Court of Appeals might have done, had it not followed the decision of the highest court of New Jersey, *since it did in fact follow it,* and further that no construction of any part of the Bankruptcy Act is involved in the question whether the bankruptcy courts must follow the state courts in the decision of these and similar tax questions.

Again counsel claim, because the court reduced the taxes of 1902 from $5,750 to $4,250, that the right to make such reduction involves a construction of the Bankruptcy Act. This we can not see. The question of the amount allowed by the court is a question depending for its solution entirely on the local statutes which do not in any way involve a construction of the Bankruptcy Act.

It is clear that nothing involved in the record, at bar, is sufficient to clothe this Honorable Court with jurisdiction of the appeal. There is involved no section of the Bankruptcy Act whose construction is *essential* to the uniform construction of the act throughout the United States. There is involved merely the construction of the statutes and decisions of New Jersey, and the courts below have followed what they believed to be the law of New Jersey governing the particular tax claim in question. Whether or not the courts below followed the best considered or the most log-

ıcal decision of the highest court of New Jersey, is not a matter for investigation or decision upon this motion, but since it appears clearly that the courts below did construe the charge with reference to the decisions of the state court, ıhey have done all that appellant claims should have been done, and this leaves appellant without any just or reasonable cause of complaint. There should be an end to litigation of this character, which prevents settlement and distribution of a bankrupt estate, and since this appeal attempts to thrust upon this court the decision of questions that were never ıntended to be brought before this bar, we again urge that it should be dismissed.

Respectfully submitted,

FREDERICK D. SILBER,
*Counsel for Appellee.*